IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	**CRIMINAL NO. 09-CR-00232-AW**
JOHN HOUSTON and	:	
MICHAEL HENSON.	:	
	:	
Defendants.	:	

UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO ADMIT CERTAIN EVIDENCE RELATIVE TO DEFENDANT MICHAEL HENSON

The United States of America, by and through its counsel Rod J. Rosenstein, United States Attorney for the District of Maryland, and Ivana Nizich and Robert McGovern, Trial Attorneys with the Domestic Security Section, Criminal Division of the U.S. Department of Justice, respectfully submits this memorandum of law in support of its motion *in limine* to admit certain evidence of defendant Michael Henson's intent, knowledge, and absence of mistake, among other reasons, pursuant to Federal Rule of Evidence 404(b).

THE INDICTMENT

On April 29, 2009, the defendant was charged via indictment with one count of Conspiracy to Smuggle Firearms into the United States; one count of Attempted Smuggling into the United States of Non-Invoiced Merchandise; and one count of false statements in violation of Title 18, United States Code, Sections 371, 545, 2 and 1001 (a)(2).

FACTS GIVING RISE TO THE CHARGES

From approximately April 2007 until at least early 2008, the defendant was employed by SOS International [hereinafter SOSI], a company contracted by the United States Department of Defense, to provide services in Iraq. The defendant worked with the U.S. military and had access to firearms while in Iraq. During part of his employment, the defendant was supervised by co-defendant John Houston, and both defendants Houston and Henson were otherwise personal friends.

In early 2008, defendant Houston contacted Henson while the latter was on leave in the United States, specifically at his home in North Carolina, near Fort Bragg. Houston informed Henson that he was smuggling weapons from Iraq to Fort Bragg. Houston also asked Henson if he wanted to secrete any materials in the smuggled shipment and to retrieve the smuggled firearms upon their illicit arrival at Fort Bragg. Henson responded, via e-mail, that he concurred with the arrangements and that he would retrieve the shipment of smuggled weapons upon their arrival at Fort Bragg.

Prior to his indictment and pursuant to their investigation of co-defendant John Houston, law enforcement officials contacted the defendant. The defendant agreed to speak with law enforcement officials on several occasions in late 2008 and early 2009. The defendant, however, made multiple false statements during the course of said interviews and meetings, including misrepresenting the fact that he had ever seen a particular weapon in co-defendant John Houston's possession. The defendant, however, subsequently admitted that the weapon belonged to him [i.e., Henson] and that he previously observed said weapon under Houston's bed in Iraq a short time before that weapon was one of eight others smuggled into the United States by both

Houston and Henson.[1]

SUMMARY OF EVIDENCE THAT THE GOVERNMENT SEEKS TO INTRODUCE AT TRIAL

At trial, the Government seeks to introduce evidence of the defendant's illicit narcotic drug procurement and attempted smuggling of this and other contraband.

LEGAL ANALYSIS

A. Federal Rule of Evidence 404(b) Establishes An Inclusive Standard For "Other Act" Evidence.

Federal Rule of Evidence 404(b) permits the government to introduce "[e]vidence of other crimes, wrongs or acts" to prove matters other than propensity, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). This is a Rule of inclusion, not exclusion. *See United States v. Mark*, 943 F.2d 444, 447 (1991) ("We have subscribed to the view of the rule as 'an inclusionary rule'") (internal citations omitted). Only evidence that "has *no purpose* other than to show criminal disposition" is barred from trial under Rule 404(b). *United States v. Van Metre*, 159 F.3d 339, 349 (4th Cir. 1998) (emphasis added); *United States v. Grimmond*, 137 F.3d 82831 (4th Cir. 1998) (same); *United States v. Queen*, 132 F.3d 991, 994-995 (4th Cir. 1997) (same). Thus, evidence of other bad acts may generally be introduced if the proponent can show that the proffered material is (1) relevant to some issue other than character, (2) necessary, and (3) reliable. *See United*

[1] The defendant is charged with this particular false statement in Count Three of the Indictment.

States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988); *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982). Additionally, "the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact-finding process." *Queen*, 132 F.3d at 997.

This test is not an especially rigorous one. "Relevance" is the lowest of evidentiary thresholds; it is defined for these purposes to include any evidence that is "sufficiently related to the charged offense." *Rawle*, 845 F.2d at 1244, n. 3. Furthermore, "necessity," as used here, does not mean absolute necessity. Rather, evidence is "necessary," for purposes of Rule 404(b), where it supplies information concerning "'an essential part of the crimes on trial,' or where it 'furnishes part of the context of the crime.'" *Mark*, 943 F.2d 444, 448 (4th Cir. 1991) (internal citations omitted). *See also id.* (evidence that tends to prove the defendant's "knowledge and intent" ordinarily is "necessary" within the meaning of Rule 404(b)); *United States v. Echeverri-Jaramillo*, 777 F.2d 933, 936 (4th Cir. 1985) (same); *Hadaway*, 681 F.2d at 218 (same).[2] "Reliability" only requires proof of the identified acts by a preponderance of the evidence. *See Huddleston v. United States*, 485 U.S. 681 (1988). Finally, the fact that evidence may be prejudicial to the defendant does not require its exclusion. "The prejudice which the rule is designed to prevent is jury emotionalism or irrationality." *United States v. Greenwood,* 796 F.2d 49, 53 (4th Cir. 1986) (referencing *United States v. Masters,* 622 F.2d 83, 87 (4th Cir. 1980)).

[2] As the *Mark* Court put it, only when the already existing evidence concerning intent and knowledge is "so strong" as to be "unassailable" is 404(b) evidence on such matters "unnecessary." *Id.* at 448.

B. Evidence Concerning the Defendant's Prescription and Narcotic Drug Procurement, and His Attempts at Smuggling this Contraband, is Admissible Under Federal Rule of Evidence 404(b) to Establish Intent and Knowledge and to Explain the Nature of Defendants' Relationship in the Instant Conspiracy.

Evidence of the defendant's unauthorized procurement and attempted transport of narcotic medications and other drugs is probative of defendant's intent and knowledge to utilize fraud and illicit means to smuggle contraband. This evidence is particularly relevant because the defendant often sought to transport such drugs by manipulating his knowledge of U.S. Department of Defense policies and practices. It furthermore is particularly relevant because evidence the government seeks to introduce concerns defendant's communications with co-defendant Houston to smuggle contraband during the late 2007 through mid-2008 period relevant to the instant indictment. Specifically, the government seeks to introduce evidence of the defendant's agreement with co-defendant John Houston to secrete and transport narcotic medications and "foot powder" and affirmative steps taken by the defendants in that regard. Additionally, evidence illustrating defendants' methods to hide the fact and nature of their conspiracy also is admissible to establish the defendants' prior relationship, *modus operandi*, agreement, knowledge and intent to smuggle contraband.

1. Evidence Relating to Defendant's Unauthorized Procurement and Transport Narcotic Medications and "Foot Powder" is Probative of Defendant's Knowledge of Means and Intent to Defraud the U.S. Government in Order to Obtain Contraband.

The government seeks to introduce e-mail and other evidence that the defendant conspired with co-defendant John Houston to illicitly procure and smuggle narcotic medications and other contraband into Iraq or while otherwise employed as Department of Defense

contractors. All such evidence is admissible given the charges in this case.

The instant indictment charges the defendant with conspiracy and attempt to *knowingly* and *intentionally defraud* the United States in order to *smuggle* and *clandestinely introduce* non-invoiced merchandise into the United States. The fact that the merchandise at issue is firearms rather than narcotic medications does not preclude admission of the above-described extrinsic acts. *See Hadaway,* 681 F.3d at 217 (evidence of participation in theft of other types of merchandise approximately eighteen months after the crime charged held admissible.) First, the defendant's illicit transportation of narcotics and unlawful movement of firearms is probative of his intent to smuggle contraband. *See Van Metre,* 150 F.3d at 350 (for earlier acts to have probative value, those acts must be similar in nature to the charged acts; "this similarity may be proved 'through physical similarity of the acts *or through the defendant's indulging himself in the same state of mind* in the perpetration of both the extrinsic offense and the charged offense.") (internal citations omitted and emphasis added).

Secondly, the defendant's knowledge and manipulation of military avenues through which to transport contraband into and out of Iraq is probative of defendant's knowledge of military methods to smuggle firearms relevant in this case. *See United States v. Sanchez,* 118 F.3d 192, 194-96 (4th Cir. 1997) (prior dealings with co-conspirator proved intent and defendant's knowledge of drug trade, and cocaine found near the defendant relevant to his knowledge of the drug trade and the mechanics of his distribution scheme).

Finally, the period during which the defendant illicitly procured narcotics is contemporaneous with the time period he and co-defendant John Houston sought to smuggle firearms, and it thereby is particularly relevant and probative of intent to defraud and knowledge

of the means through which to do so.

As case law cited above supports, such evidence is admissible pursuant to Federal Rule of Evidence 404(b) to illustrate defendant's knowledge and intent to smuggle contraband into and out of Iraq. The fact that the defendants conspired to smuggle contraband using U.S. military channels with which they had particular and specialized knowledge makes it all the more relevant and necessary to prove that the defendants possessed the requisite means and *mens rea.* Additionally, the above-described evidence of defendants' attempts to smuggle contraband is contemporaneous with the period relevant to the instant indictment, i.e., 2007 and 2008, when the defendants were both employed as Department of Defense contractors.

The fact that the defendants are charged with smuggling firearms – rather than narcotic medication and other materials – in the instant indictment does not preclude admission of their prior attempts to smuggle contraband and to defraud the United States. The fact that the defendants engaged in prior smuggling and fraudulent schemes – almost always by abusing their military and government affiliation – is sufficiently similar to the circumstances of the smuggling and fraud charges contained in the instant indictment to warrant admission of such extrinsic act evidence.

2. Defendant's and Co-Defendant's Attempts to Smuggle Illicit Narcotics While Department of Defense Contractors are Admissible to Establish the Conspiratorial Relationship of the Defendants and Support the Government's Evidence of the Existence of the Instant Conspiracy.

As set forth above, the government seeks to introduce e-mails and other evidence of defendants' plans and attempts to procure and smuggle narcotic medications and their illicit shipment of packages containing "quite a bit of foot powder" from the United States and Europe

to Iraq and Afghanistan.[3] The defendants' agreement and plans to smuggle such items involved, in part, use of return addresses "pulled out of the phone book" and military APO addresses.

Under the "inclusionary" approach to 404(b) in this Circuit, evidence of other, similar bad acts may be admitted to explain to the jury how the relationship between defendants and cooperating witnesses developed, and to demonstrate the context of certain events relevant to the charged offense. *See Sanchez,* 118 F.3d at 195 (the Fourth Circuit has "made clear that 404(b)'s specific list of acceptable grounds for admission of evidence is not exhaustive.") *See also Queen,* 132 F.3d at 994-95, 995 n. 3 (the list of admissible prior acts enumerated in Federal Rule of Evidence 404(b) is not exhaustive, and "this circuit has found prior act evidence admissible for a wide range of reasons unrelated to character").

Indeed, the Fourth Circuit has upheld admission of other acts evidence that is similar to the charged crime in order to show the basis of an alleged co-conspirator's trust in the defendant, as relevant background information to explain the relationship among alleged co-conspirators, and to aid the jury's understanding of how a transaction for which the defendant was charged came about and the defendant's role therein. *See United States v. Boyd*, 53 F.3d 631, 437 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 322 (1995) (evidence of defendant's personal drug use in front of co-conspirator admissible as relevant to show the close nature of defendant's relationship with, and established level of trust in, co-conspirator, which is thereby probative of the likelihood that the defendant and other party were, in fact, co-conspirators); *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994) (upholding admission of other acts evidence as helpful "to explain to the

[3] Following defendant's employment with SOSI, the defendant worked for another contractor in Afghanistan in mid-2008 but remained in e-mail contact with co-defendant Houston while the latter was in the United States and Iraq.

jury how the illegal relationship between participants in the crime developed").

In *McMillon*, witness testimony of persons who acted in various capacities within a drug ring operated by the defendant was admissible and "helpful in providing the jury with an understanding of how the" witnesses knew the defendant, "and how it came about that they were trusted brokers or other participants in" the defendant's illegal dealings. *Id.* at 955. Similarly, in the instant matter, evidence of Houston's and Henson's attempts to illicitly procure and smuggle narcotics and other substances and their prior collusion to "establish a cover story" and "plan strategy" to defraud others is admissible to explain the close nature of the defendants' relationship and how the illegal relationship between the defendants developed in relation to the unlawful smuggling venture charged in the indictment.

Moreover, the government seeks to introduce a series of e-mails dating from late 2007 through 2008 between defendants Houston and Henson wherein the defendants discuss the need to coordinate stories regarding investigations of Houston's improper and illegal narcotics procurement, smuggling, and possession, as well as other investigations involving allegations of their financial and other improprieties in Iraq. These e-mails include discussions of their joint efforts to establish "a cover story" regarding Houston's concealment of unauthorized medication at SOSI's offices in Iraq and "planning strategy" to impugn other SOSI employees that, in turn, accused either or both defendants of improper or illegal behavior.

This evidence further establishes the close conspiratorial relationship between the two defendants, and their intent to use obfuscation and deceit to further the object of both the charged and uncharged conspiracies – to smuggle contraband across international borders.

D. The Probative Value of the Other Crimes Evidence Far Outweighs its Prejudicial Value and is Not Subject to Exclusion Under Federal Rule of Evidence 403.

The above-described extrinsic act evidence is not subject to exclusion under Federal Rule of Evidence 403 because its prejudicial effect does not outweigh its probative value. The evidence the government seeks to introduce is relevant, necessary and reliable without being inflammatory.

By its terms, Federal Rule of Evidence 403 is designed to exclude otherwise admissible evidence in limited circumstances. The rule only operates where the "probative value" of the evidence "is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or the misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added). To be "unfairly prejudicial," the evidence must be of such character that it results in "an undue tendency to suggest a decision on an improper basis." *See* Advisory Committee Notes to 1972 Amendments. Put another way, there must be a genuine risk that the challenged testimony will lead the jury to act irrationally, and this risk must be disproportionate when compared against the probative value of the evidence. *See Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988). Federal courts have repeatedly explained that there is *no* unfair prejudice to the defendant where the proffered 404(b) evidence involves another crime of similar (rather than a more sensational or disturbing) nature. *See Boyd*, 53 F.3d at 637 (4th Cir. 1995) ("In this case, the balancing test undeniably weighs in favor of admitting the evidence, because the evidence of [the defendant's] personal use of marijuana and cocaine did not involve conduct any more sensational or disturbing than the crimes with which he was charged."); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995)

(evidence that defendant repeatedly raped his daughter was not unduly prejudicial and was therefore admissible in prosecution for aggravated sexual abuse of minor; evidence was highly probative and judge gave appropriate limiting instruction); *Van Metre,* 150 F.3d at 351 ("there is no unfair prejudice under Rule 403 when the extrinsic act is no more sensational or disturbing tha[n] the crimes with which the defendant was charged;" admission of evidence concerning the defendant's prior abduction and rape of a victim was "no more disturbing than the circumstances of . . . kidnapping and murder" at issue in the instant case) (referencing *United States v. Boyd,* 53 F.3d at 637)).

This principle applies here. The extrinsic acts the government seeks to introduce are confined to events similar in time and character to those charged in the instant indictment. The government's 404(b) evidence would be offered here for the limited – and very legitimate – purpose of showing knowledge, intent, and lack of mistake or accident. This is precisely the sort of other act evidence commonly admitted by federal courts. *See supra* at 3-9 (citing cases in which evidence of extrinsic acts was allowed at trial). That admission of such extrinsic act evidence would necessarily damage the defendant's defense is of no moment. "Relevant evidence is inherently prejudicial . . . . To the extent that the defendant perceives Rule 403 as a tool designed 'to permit the court to "even out" the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none,' he is mistaken." *United States v. Bradley*, 145 F.3d 889, 893 (7th Cir. 1998) (internal citations omitted).

Furthermore, introduction of the government's extrinsic act evidence will not cause undue delay. The government can and will introduce evidence concerning the other acts through limited testimony and documents presented by a handful of witnesses, most of whom will already

be testifying about the charged conduct.

Finally, the risk of jury confusion is not substantial here. There is no reason to believe that this additional evidence will create an undue risk that the jury will be side-tracked. In fact, introduction of the identified evidence will likely reduce the possibility of jury confusion: this evidence is being offered to shed light on crucial issues regarding the defendant's mental state, his knowledge of the means to smuggle contraband through military and government channels, his relationship with his co-defendant, and during a specific time period (2007 and 2008). Federal Rule of Evidence 403 therefore presents no bar to admission of the government's 404(b) evidence.

CONCLUSION

For the reasons stated, the United States respectfully requests that the Court permit the government to introduce the identified extrinsic evidence in its case-in-chief.

Respectfully submitted,

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Date: February 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2010 that a true and accurate copy of the foregoing Government's Memorandum of Law in Support of Its Motion *In Limine* to Admit Certain Evidence Relative to Defendant Michael Henson was served on all parties via the Court's ECF system:

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